

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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J.K. INTERNATIONAL PTY. LTD., :

Plaintiff, :

- against - :

OLDENDORFF CARRIERS GMBH & CO., :

Defendant :

07 Civ. 7328 (SHS)

ECF CASE

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DECLARATION OF VAMAN PRABHU

VAMAN PRABHU, pursuant to the provisions of 28 U.S.C. 1746, declares and states as follows:

1. I am employed by Oldendorff Carriers GmbH & Co., KG, India Branch office, as Operations Manager, since 16th August 2006. My office is located at 82, 8th floor, Free Press Journal Road, Narlman Point, Mumbai 400 021, India. As the Operations Manager, I am responsible for all vessel operations matters in relation to Oldendorff Carriers' owned and/or chartered vessels calling at ports in India, particularly the Mumbai Port. Amongst my area of responsibilities, I attend to operation matters of loading and discharging vessels at stream and the Mumbai outer anchorage, known as the BFL. Accordingly, I am well aware of the procedures and the cargo operations in the Mumbai Port.

2. Before my present employment with Oldendorff Carriers, I was in the employment of M/s. J.M. Baxi & Co., a very large vessel agency/stevedoring House in India from 2nd August 1999 to 1st August 2006. During that time, I was in charge of, and dealt with, entry of vessels in the Mumbai Port under the said agency; documentation matters both in relation to the Port and Customs in respect of the vessels calling Mumbai under the agency; arranging for hire of barges and permissions for stream and outer anchorage discharge operations in respect of steel cargo. Accordingly, I have more than 8 years experience in respect of vessel operations in the port of Mumbai and in respect of matters that I am deposing to, by this declaration. I am therefore familiar with the requirements for ships working and lightening at the outer anchorage at Mumbai. The inner anchorage and berths at Mumbai have draught restrictions of 10.5m and 10.0m and ships with deeper draughts have to lighten either at the outer anchorage at Mumbai (referred to as 'BFL') or to lighten at other ports in India, before entering the inner anchorage or berthing alongside.
3. I have seen the following documents:
 - a. Declaration of Adam Russ dated 21 October 2007 and Exhibits 1 – 7.
 - b. Declaration of Sandeep Mohan dated 12 November 2007 and Exhibits 1 - 20.
4. The southwest monsoon has a significant effect on the ports of the west coast of India including Mumbai. I attach at Exhibit 1 information obtained from the Government of India, Meteorological Department, in relation to the 2007 Southwest Monsoon. As can

be seen from the document - 'Onset of Southwest Monsoon', the arrival of the monsoon was delayed over the east central Arabian Sea by a super cyclonic storm 'Gonu'. As can be seen from the document also from the India Meteorological Department 'Long Range Forecast Update', paragraph 2 on page 2, the southwest monsoon was almost 10 days earlier than the normal date and there is again reference to the effect of the cyclone 'Gonu' in slowing the advance of the monsoon. I attach at Exhibit 2 copies of articles showing the significant effect the southwest monsoon has on the markets in India.

5. I attach at Exhibit 3 an Extract from the Merchant Shipping (Life Saving Appliances) Rules, 1989, framed under and pursuant to the Merchant Shipping Act, 1958, which defines the period of 'foul weather season' for the Arabian Sea, as the season beginning on and from the 1st June and ending with the 31st August. This is consistent with the restrictions placed on the barges used to lighten ships at the outer anchorage and an example is found at Exhibit 4 of the m.v. Gaj Laxmi, where the foul weather period during which the barge can 'ply' within inland waters only, commences 26 May. This has been confirmed by correspondence between Vinayak Multimodal Transport Pvt Ltd (providers of barges for such lightening operations) dated 21 November 2007 and the Maharashtra Maritime Board ("MMB") (the Authority that licences the barges used for lightening at the outer anchorage) dated 27 November 2007, where the MMB has confirmed that barges are not permitted to carry out loading/discharging operations at the BFL during the foul season. The MMB has also confirmed that the foul season at Mumbai runs from 26th May to 31st August (Exhibit 5).

6. The Port Authority of Mumbai, the Mumbai Port Trust ("MbPT") owns the Mumbai Port and its anchorages, and it exercises control over the port and its anchorages, including in respect of operations at the port and its anchorages during the monsoon period / foul weather season. I attach at Exhibit 6 copies of Notices issued by the MbPT in relation to the closure of the storm gates to the port of Mumbai over high tide:

a. Notice from MbPT dated 19 May 2006. The start date of the closure of the gates is 1 June 2006.

b. Notice from MbPT dated 25 May 2007 which is not legible but reads as follows:

"With reference to the above subject, letter and as announced by Executive Engineer (M) in the O G meeting at Ambedkar Bhavan on 25.5.2007, this is to inform you that the Storm gate will be closed for 4 hours i.e. 3 hours before the maximum high tide time and 1 hour after the maximum high tide from 4 June 2007 to 30 September 2007; so as to protect both the Lock gates and ships inside the Indira Dock against heavy sea swells and stormy weather condition during the monsoon season."

c. Circular from MbPT dated 26 June 2006 which confirms that during the foul weather season, all anchorages south of the "A" line fall outside the inland water limits and are therefore, decommissioned, during the monsoon season, resulting the restrictions on 'Stream' and 'outer anchorage' discharge operations during the monsoon season. It will therefore be noted that in view of the above, the barges used for

lightening, cannot proceed to such decommissioned places during the monsoon season, for lightening operations, also in view of the restrictions imposed on the barges' operations in accordance with their certificates of registration. By the said circular, the Port has notified 'All Vessel Owners/Agents carrying out steam discharge in Mumbai harbour' of the limits of 10.0m draught for panamax size vessels and 10.5m draught for handymax vessels (because of the shorter length of the handymax vessels); and at paragraph 4, the circular states:

"You are requested to advice [sic] your principals not to exceed the above mentioned drafts as during the foul weather season (monsoon) it is not possible to discharge cargo at BFL area for the purpose of lightening the ship."

In my experience, the above restrictions does not just apply to periods after the monsoon has started, but during the entire monsoon season as recognised by the MbPT and the Certificates of Survey of the barges, i.e. from 26th May to 31st August. This is confirmed by the letter from Vinayak Multimodal Transport Pvt. Ltd. dated 23 August 2007 [Exhibit 7] and also a letter from the MbPT dated 24 August 2007 which confirms the draft available in the harbour at 10.0m at chart datum; reiterates the details of the MbPT Circular dated June 2006; and that whilst vessels may work at outer anchorage if she is able to do so, but that the barges involved in the lightening operations, "may only ply up to the limit prescribed in their licence" [Exhibit 8]. Consequently, even if a vessel can work at outer anchorage, such work is not possible on account of the barges required for such lightening at the outer

anchorage, not being permitted to ply to the outer anchorage/BFL area during the monsoon season.

7. For a ship to be permitted to carry out cargo operations at the outer anchorage, it requires permission from the following authorities:
 - a. Deputy Conservator MbPT for discharge/lightening at the outer anchorage,
 - b. Deputy Docks Manager of the MbPT for landing of lightened cargo,
 - c. Deputy Commissioner of Customs - for permission to discharge at the outer anchorage/BFL with reference to the barges to be used for the lightening operation.

I attach at Exhibit 9 documents in relation to the vessel, Spring Progress, between that vessel's agents, Parekh Marine Agencies Pvt. Ltd., and each of the three authorities referred to above, in relation to discharge/lightening at the outer anchorage. The control of the MbPT in relation to cargo operations at the outer anchorage is evident from the comment on the letter dated 22 October 2007 to the Deputy Conservator MbPT, where the MbPT states: "Permitted subject to Customs clearance and formalities. Barges to operate as per limits of certificate of registry". In my experience what is being referred to by certificate of registry is the certificate of survey referred to above with the foul weather operations limits. This shows that the control of the MbPT in respect of barges plying at the outer anchorage is being exercised even outside of the monsoon season (i.e., May 26 – August 31). I attach as Exhibit 10 a document, which appears to be a Contract between JKI and

United Shippers Ltd. Undoubtedly, there are references in the said documents of use of barges for unloading the mother vessel, m.v. FREDERIKE OLDENDORFF. However, in my experience, these barges could have been used only within their trading/operation limits as set out above, in their respective Certificate of Survey / Certificate of Registration. Such barges could not have lawfully operated at the outer anchorage/BFL during foul weather season i.e. from 1st June to 31st August.

8. I would contrast the explanation of what is required to lighten at the outer anchorage by way of application for permission to the relevant authorities, with what has been produced by JKI. The only letter I have seen to one of the relevant authorities is one from Sahi Oretrans Pvt. Ltd. dated 26 May 2007 [Exhibit 11], to the Deputy Manager, Cargo Control, MbPT, for permission to land cargo from barges, to bag and stack and to store cargo. The letter does refer to lightening of cargo into barges at BFL, but this letter is not permission in itself to carry out the lightening operations at the BFL. That permission *must* be obtained from the Deputy Conservator of the MbPT.
9. As explained above, one of the authorities that is required to give permission to lighten at the outer anchorage is the Customs. There is no such application for permission relied on by JKI in any of the documents I have seen in late May or early June 2007. I have seen a letter from Sahi dated 17 August 2007 (Exhibit 12) to Customs, but this is in relation to discharge after lightening at Mundra. The explanation given to the Customs authorities for having to lighten at Mundra is a strange one in that it states: "However due to the vessel's excess arrival draft she did not have the possibility of berthing alongside or at inner anchorage." It is

almost as if Sahi believed that the vessel could have berthed or gone to the inner anchorage with her arrival draft, which was in excess of the maximum permitted 10.5m draft.

In conclusion, it is my view that :

- (a) there is a recognised 'monsoon/foul weather' season which starts on 26th May, in accordance with the certificates of survey of the barges used in the lightening operations in the Mumbai outer anchorage (BFL) and the confirmation from the Maharashtra Maritime Board (MMB), the Statutory Authority in respect of such barges; and in any event, on 1st June in accordance with the Life Saving Appliances Rules (1989) issued under the (Indian) Merchant Shipping Act, 1958.
- (b) There are permissions required to discharge at the outer anchorage as I have stated hereinbefore and JKI have not produced any such documents of such requests for permissions for discharge at outer anchorage with the use of barges. In any event, on account of the barges itself requiring to be plied within inland water only during the monsoon foul weather season, discharge / lightening at outer anchorage with barges would not have been possible from 1st June.
- (c) Even if a vessel can work at outer anchorage, such work is not possible on account of the barges required for such lightening at the outer anchorage, not being permitted to ply to the outer anchorage/BFL area during the monsoon season.

- (d) These barges could have been used only within their trading/operation limits as set out in their respective Certificate of Survey / Certificate of Registration. Such barges could not have been operated at the outer anchorage/BFL during foul weather season i.e. from 1st June to 31st August.

I declare under penalty of perjury and the laws of the United States of America that the foregoing is true and correct.

Executed at Mumbai, India, on this 14th day of December 2007.



VAMAN PRABHU